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[\*Gibson v. Arizona Public Service Co.\*, 90-ERA-29 \(Sec'y Sept. 18, 1995\)](#)

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DATE: September 18, 1995  
CASE NOS. 90-ERA-29  
          90-ERA-46  
          90-ERA-53

IN THE MATTER OF

CURTIS GIBSON,

COMPLAINANT,

v.

ARIZONA PUBLIC SERVICE COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This proceeding arises under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and is before me for review of the Recommended Decision and Order (R.D. and O.) issued by the Administrative Law Judge (ALJ) on January 2, 1992.

Complainant, Curtis Gibson, was employed by Butler Service Group, Inc. (Butler) as a temporary plant electrician at Palo Verde Nuclear Generating Station (Palo Verde) from February 1989 until January 1990, when he was laid off. Transcript (T.) at 149. Respondent, Arizona Public Service Company (APS), a public utility that furnishes electric service throughout Arizona, manages the operation of Palo Verde. Gibson was supervised by APS personnel. T. at 159.

After his lay-off, Gibson filed three complaints against APS. He alleges that APS violated the ERA when it (1) released, suspended, and reprimanded him in December 1989, (2) misplaced his application for reemployment at Palo Verde, and (3) refused

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to rehire him in April 1990. The complaints were consolidated for hearing. After conducting a lengthy hearing, the ALJ determined that the allegations should be dismissed. I agree, as explained below.

DISCUSSION

After recounting the evidence, the ALJ correctly indicated that the burdens of proof and persuasion in whistleblower cases are set forth in *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-9. R.D. and O. at 16. Although he made several errors in finding that Gibson established a *prima facie* case, the errors do not change the outcome of this case.

In view of these errors, the ALJ's ruling that Gibson established a *prima facie* case is suspect. However, as the Secretary has explained in numerous cases, once the case is "fully tried on the merits," the answer to the question whether the complainant made a *prima facie* showing is not particularly useful. *E.g.*, *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11, *appeal filed*, No. 95-1729 (8th Cir. Mar. 27, 1995). APS articulated legitimate, nondiscriminatory reasons for its actions, and thus, the question becomes whether the explanation is pretextual and whether Gibson met his ultimate burden to prove by a preponderance of the evidence that the actions were taken in retaliation for protected activity. *Carroll*, slip op. at 11-12; see *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). The ALJ proceeded to consider the entire record and reached the conclusion that Gibson failed to meet his ultimate burden. After thoroughly reviewing the evidence, I find that the ALJ's conclusion is sound.

I first note that it is unnecessary to consider Gibson's second claim that APS mishandled his December application for reemployment. In his brief before the Secretary, Gibson, who has been represented by counsel throughout the proceeding, waives that claim. Brief at 2 n.1. In addition, the propriety of Gibson's lay-off is not an issue in this proceeding.

#### *Protected Activity and Adverse Actions*

There is no dispute that Gibson was subjected to adverse employment actions and that he engaged, to some extent, in protected activity during the course of his employment. On December 19, 1989, Gibson threatened to contact the NRC, and he subsequently followed through. See 42 U.S.C. § 5851(a)(1), (3); *Saporito v. Florida Power & Light Co.*, Case No. 89-ERA-7/17, Sec. Dec., Feb. 16, 1995, slip op. at 5 (threat to go to the NRC protected); *McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 7 (safety complaint communicated to NRC protected).

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Contrary to APS' argument, Gibson also engaged in protected activity prior to December 19. As early as May 1989, Gibson began complaining that a particular electrical procedure, 13JZZI004, was too confusing to be followed with accuracy. See T. at 166-67. In September 1989, Gibson raised a concern about radiation exposure resulting from valve operation, and he suggested that APS alter the mechanism to reduce exposure. T. at 162, 248; Complainant's Exhibit (CX) 29. In November, he complained that he was being assigned to work on a reactor with insufficient training. T. at 177, 256. He also questioned, continuously during his employment, whether APS was providing adequate maintenance of gear boxes. T. at 170-75. Questioning safety procedures and raising safety issues internally constitute protected activity. See *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

The fact that many other Palo Verde workers raised similar internal safety concerns in the course of performing their jobs, though relevant to issues of causation, does not render Gibson's concerns unprotected. Cf. *Jopson v. Omega Nuclear Diagnostics*, Case No. 93-ERA-0054, Sec. Dec., Aug. 21, 1995, slip op. at 6 (reporting safety violations even in the course of one's regular duties is protected). In addition, there is evidence that in November, Gibson told the Employee Concerns manager that he was considering contacting the NRC about safety and morale problems in the shop. T. at 89, 182-83. *The Release, Suspension, and Reprimand*

The record fully supports the ALJ's decision to credit APS' explanation of why it released, suspended, and reprimanded Gibson in December 1989. Gaylon Olson, Gibson's supervisor, testified that he decided to release Gibson in mid-December, almost immediately upon confirming that Gibson violated a company policy. Olson explained that he wanted to demonstrate his firm position on that policy. T. at 341-42. Considering the record as a whole, Olson's testimony is inherently probable and highly credible.

During 1989 morale was low in Gibson's department. T. at 183. There was a significant amount of friction, name-calling, and finger-pointing between the workers. T. at 69, 104. According to Gibson, there was "massive confusion, backstabbing, . . . distrust, suspicions, [and] accusations." T. at 183. The primary conflicts were over pro-union and anti-union sentiments and between direct employees and contract employees. T. at 336, 190. Eventually, one of the workers, Kathy Smith, filed a complaint with APS' Employee Concerns Department in October 1989, alleging that Gibson and several others were harassing her because she was a "whistleblower." See T. at 66-67, 70-71, 103,

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116, 134-35; Respondent's Exhibit (RX) 5. In turn, several workers filed complaints with the APS supervisor alleging that Smith was harassing them. T. at 139-40. APS concluded the

investigation of these complaints by issuing a memorandum, which a manager read aloud on December 1, 1989. T. at 103. The memo advised that incidents of harassment will not be tolerated, and further stated:

Any employee engaging in comments or conversations regarding an employee who has contacted Employee Concerns could face disciplinary action and possible termination. APS employees will be disciplined using the step-wise method and contract employees will be disciplined through their respective companies. . . . I'll ask you to refrain from finger pointing and the use of names. . . . It should be noted that failing to follow these instructions may subject you to disciplinary actions.

RX 5. Gibson was informed personally of the memo and its warning on December 1. T. at 194, 275.

On December 10, Smith complained that Gibson was harassing her again. T. at 116-17. It is undisputed that Gibson made a derogatory remark about Smith several days after the December 1 memo was issued. T. at 201, 276-77; RX 10. On December 19, following an investigation, Gibson was notified that he was being terminated or, more precisely, "released back" to Butler, his contractor. T. at 202-203; CX 31.

This evidence that Gibson engaged in wholly unprotected misconduct immediately before Olson's decision belies a causal connection between earlier, ongoing protected activity and Olson's decision. See *Monteer v. Milky Way Transp. Co., Inc.*, Case No. 90-STA-9, Sec. Dec., Jul. 31, 1990, slip op. at 4. Moreover, the ALJ credited Olson's testimony that at the time he decided to release Gibson he had no knowledge of Gibson's having raised safety concerns. T. at 344. Gibson does not claim that he raised his concerns with Olson, and again, Olson's testimony is believable in view of his minimal contacts with Gibson; the large size of the department and number of foremen underneath Olson; and the distant location of his office in relation to the shop. T. at 268, 333-34. Thus, Gibson's pre-December 19 protected activities could not have motivated Olson's decision.

Furthermore, Gibson admitted that APS upper management and foremen constantly encouraged employees to raise their safety concerns. T. at 238-243, 248. His department had safety meetings almost weekly, during which he and others raised concerns. T. at 244, 246, 249. Numerous people raised concerns about 13JZZI004. T. at 250. According to Gibson, "[u]pper

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management at Palo Verde let it be known that they wanted us to reduce radiation levels." T. at 249. Given this compelling evidence of a pervasive policy encouraging safety complaints, I am unpersuaded that retaliation was a factor in Olson's decision. See *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

After being informed of Olson's decision, Gibson requested a meeting with James Levine, APS' Vice-President of Nuclear Production. T. at 205, 28, 287. In complaining about the release, Gibson threatened to take safety concerns to the NRC.

T. at 205. Gibson conceded that Levine never discouraged him from contacting the NRC. T. at 282. As a result of the meeting, Levine reversed Olson's decision to release Gibson, and Gibson instead was suspended for three days. Levine testified that he concluded that the violation was not severe enough to warrant

release. T. at 46. The ALJ credited Levine's testimony, and I find no reason to disturb his finding.

In reducing Gibson's punishment, APS also issued a written reprimand, dated December 22, 1989. CX 37. Olson did not order or authorize the reprimand and Levine did not recall knowing of the reprimand until he gave his deposition. Both testified that they believed it was against APS' policy to reprimand a contract employee. T. at 49, 360. Ron Eban, who was substituting for Olson while he was on vacation in late December, signed the letter of reprimand. T. at 375. Gibson claims that APS failed to articulate a rationale sufficient to meet its burden with regard to the letter of reprimand. I disagree.

David Heler, APS' Supervisor of Employee Relations, and another manager actually drafted the letter. T. at 382. Heler testified straightforwardly that he issued the letter at the request of Levine, in consultation with Butler, and that it was based strictly on Gibson's violation of the December 1 memo. T. at 381-82, 384. Even though the letter was out-of-the-ordinary and was issued on APS stationary, I am not convinced that retaliatory animus was a factor, particularly since Levine's reversal of the initial disciplinary decision was itself atypical. See T. at 396, 413. Butler's site representative, Betty Drake, testified that she was consulted but asked Heler to draft the letter. She believed Gibson should have been released as originally decided. See T. at 407-408. Nor does the fact that Levine did not recall the reprimand letter render Heler's explanation void or even contradicting. I, therefore, reject Gibson's arguments that the letter was retaliatory because it deviated from company policy.

There is considerable evidence indicating that Gibson threatened to go to the NRC on December 19 as "leverage." See T. at 406, 288, 285. While the ERA prohibits retaliation based on

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protected activity regardless of the whistleblower's motives, *Carter v. Elec. Dist. No. 2*, Case No. 92-TSC-11, Sec. Dec., Jul. 26, 1995, slip op. at 19, in this case the adverse action was initiated before Gibson's December 19 protected activity. At that time APS already had determined, for legitimate and nondiscriminatory reasons, that punishment was warranted. While the punishment may have been reduced as a result of Gibson's protected activity during the December 19 meeting with Levine, Gibson's suspension and reprimand cannot be considered actionable retaliation within the meaning of the ERA.

*The Refusal to Hire*

In March 1990, Gibson was one of seventeen workers referred to APS for possible reemployment on a valve crew. He was not one of the eight selected. The decision was made by Warren Weems, who succeeded Olson upon his retirement. T. at 445, 352. Weems had been a foreman in Gibson's department, and though he never supervised Gibson directly, he was aware of Gibson's involvement in the "childish bickering" and was aware that Gibson violated the December 1 memo. See T. at 428-433. In addition, Weems testified candidly that Gibson told him about contacting the NRC and using it as leverage to keep his job. T. at 434, 467.

Weems explained, however, that his decision was based on his

knowledge and information about the applicants' work experience and work habits. See T. at 445-451. Specifically, he decided not to select Gibson based on Gibson's limited nuclear experience and education, lack of apprenticeship, remarks about other workers, and poor quantity of work. T. at 453-54, 469-70.

I have considered the arguments and relevant evidence carefully, and I find that Gibson failed to meet his burden to prove that Weems' explanation is a pretext for retaliation. While Gibson had extensive experience as an electrician, he had less nuclear experience than any of those selected. In fact, Gibson only claimed that two of the eight who were hired were less qualified than he. T. at 235-36. In his deposition, Gibson even conceded that he "had no quarrels" about one of the two. T. at 297. All eight had recent experience at Diablo Canyon Nuclear Power Plant in addition to Palo Verde; Gibson did not. See RX 14-21; T. at 490, 552-54, 595.

Further, Weems relied upon past contact with Gibson in making the decision not to hire him. In August 1989, Weems assisted in investigating the morale problem and interviewed Gibson. It is undisputed that at that time Gibson "expressed a desire not to work with Manny Salcido, Dick Wendt, and Kathy Smith." T. at 258. Weems claims that Gibson actually stated that "if he ever got assigned to work with those people, that he wouldn't work with them, he would go home sick." T. at 430. Weems' version is more credible because it is partially

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corroborated by documentary evidence, RX 9, and is consistent with Gibson's otherwise hostile attitude. For example, in responding to other conflicts in the workplace, Gibson publicly commented that he would "take care of the problem" himself. T. at 266. It is not surprising that Gibson's remarks about co-workers "stuck" in Weems' mind, T. at 453, especially since Salcido was working on the job with the valve crew members. T. at 464, 487, 587.

Weems testified that it seemed like Gibson spent too much time in the shop talking and doing other things when he should have been working. T. at 454. Weems' perception is reasonable since Gibson played such a prominent and active role in the shop bickering. Contrary to Gibson's argument, Weems' perception was not based solely on Gibson's behavior after December 19, rather, Weems referred to the whole of Gibson's employment. *Id.* Nor does the record establish that Gibson was more productive than one of the chosen applicants, as Gibson alleges. In contrast, the record shows that several of the eight Weems hired, including Gibson's two sons, also had engaged in protected activity of which Weems was aware. T. at 249, 455, 486, 590.

I conclude that Gibson's protected activity played no part in Weems' decision. Even assuming that Gibson's protected activity played some part in the decision, Respondent has shown that it would not have selected him in any event, based on relative qualifications and his remarks about co-workers. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).

Accordingly, this case IS DISMISSED.  
SO ORDERED.

ROBERT B. REICH  
Secretary of Labor

Washington, D.C.